UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN STEMMELIN,

Plaintiff,

v.

MATTERPORT, INC., et al.,

Defendants.

No. C 20-04168 WHA

ORDER RE MOTION TO STRIKE PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

INTRODUCTION

In this false and deceptive advertising action, plaintiff seeks a second opportunity to certify a national class of those who enrolled in defendant's 3D camera partner program, this time under Rule 23(b)(2). Defendant moves to strike plaintiff's motion. To the following extent, the motion to strike is **GRANTED**.

STATEMENT

Previous orders herein described our facts (Dkt. No. 168). In brief, plaintiff John Stemmelin brought this lawsuit against Matterport, Inc., and its officers as a putative class action in June 2020, alleging violations of, among other claims, unfair and false advertising laws as well as numerous states' business opportunity laws connected to Matterport's 3D camera business. The operative case management order only contemplated one class-certification motion, although it did not explicitly foreclose on another (Dkt. Nos. 52, 70, 165).

A March 2022 order denied Stemmelin's motion to certify an Illinois class and a national class based on, among other reasons, lack of predominance (Dkt. No. 136). After Matterport filed its motion for summary judgment, Stemmelin voluntarily withdrew his Illinois claims (Dkt. No. 147). This has left Matterport Inc., as the only remaining defendant in our action. An August 2022 order granted Matterport summary judgment as to Stemmelin's request for declaratory relief that he is the owner of certain scanned images and denied the motion as to Stemmelin's California Consumer Legal Remedies Act claim and his request for injunctive relief (Dkt. No. 168).

Later in August, Stemmelin filed a second Rule 23 motion, this time seeking certification of an injunctive relief class pursuant to Rule 23(b)(2) (Dkt. No. 171). Matterport now moves to strike Stemmelin's renewed motion for class certification (Dkt. No. 172). This order follows full briefing and oral argument.

ANALYSIS

Rule 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." Our court of appeals has not yet ruled on a specific standard for review of serial motions for class certification, but some judges in our district have used the reconsideration standard. *See e.g. In re Lithium Ion Batteries Antitrust Litig.*, 2018 WL 4215573 at *3-4 (N.D. Cal. Sept. 4, 2018) (Judge Yvonne Gonzalez Rogers); *English v. Apple Inc*, 2016 WL 11008929 at *5 (N.D. Cal. Mar. 22, 2016) (Judge William H. Orrick); *Daniel F. v. Blue Shield of California*, 2015 WL 3866212 at *3 (N.D. Cal., June 22, 2015) (Judge Phyllis J. Hamilton). A district court will grant a motion for reconsideration if (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) the court failed to consider material facts or dispositive legal arguments which were presented to the court. Civ. L.R. 7-9; *see also* FRCP 23 Advisory Committee Notes. This makes good sense. Permitting serial certification motions encourages gamesmanship and overbroad initial motions. This wastes resources.

Stemmelin relies heavily on a decision from the United States Court of Appeals for the Third Circuit that declined to apply the reconsideration standard to a renewed motion for class

certification. The decision held that even absent new evidence or change in law, a plaintiff can succeed on a renewed motion "if they more clearly define their proposed class." *Hargrove v. Sleepy's LLC*, 974 F.3d 467, 477 (3rd Cir. 2020). But this decision is not mandatory authority here and constitutes a "unique" minority view. *See* William B. Rubenstein, Newberg and Rubenstein on Class Actions § 7:35 (6th ed. 2022). This order declines to adopt this approach for the reasons stated.

Allowing this belated motion would promote tactics that waste judicial resources and unnecessarily protract litigation. Stemmelin filed his second class-certification motion five months *after* the denial of his first motion, and two months *after* the June 2022 deadline for dispositive motions (*see* Dkt. Nos. 70; 136). Even if we did not use used the reconsideration standard, this delay warrants striking the motion.

In all events, Stemmelin has also not met the reconsideration standard. He has not put forward any new material evidence or law that would amount to a change in circumstances. Nor has he shown that the Court failed to consider material facts or dispositive arguments. That the summary judgment order explicitly found that Stemmelin has standing to pursue injunction relief does not constitute a change in circumstances, and hence cannot justify reconsideration (See Dkt. No. 168 at 6).

Only after Stemmelin's first motion concerning a broader Rule 23(c) class was denied did he seek to certify a class with a narrower class definition under Rule 23(b)(2). Plaintiffs cannot justify a second motion when their only justification is "that they have now narrowed their class based on evidence they previously had access to and they cite no changed circumstances that prevented them from seeking a narrower class initially." *Markson v. CRST Int'l, Inc.*, 2022 WL 1585754 at *2 (C.D. Cal, Apr. 6, 2022) (Judge Stanley Blumenfeld, Jr.) (internal quotation marks omitted).

Stemmelin concedes that he simply "did not foresee the need when he filed his first motion for class certification to specifically seek certification of a Rule 23(b)(2) injunctive relief class." He further argues that if his first motion had been granted, he "could have sought injunctive relief on behalf of the class" (Opp. 6). Nothing, however, prevented Stemmelin from

seeking certification of a narrower class under a less sweeping theory in the first place. Seeking certification of a broader class was a tactical move. Stemmelin made an "all or nothing bet" and now he seeks to escape the consequences of those tactics. *Markson*, 2022 WL 1585754 at *2.

Furthermore, the "new" supporting evidence referenced by Stemmelin, a webpage that allegedly shows that Matterport abandoned the MSP program, is merely another iteration of what Stemmelin has presented previously. He concedes the present motion is "based upon most of the same evidence" (Opp. 6). Rule 23(c) provides "[p]laintiffs with a limited opportunity to adduce additional facts: It is not a Trojan Horse by which [they] may endlessly reargue the legal premises of their motion." *Stockinger v. Toyota Motor Sales, U.S.A., Inc.*, 2020 WL 7314794 at *3 (C.D. Cal, Nov. 30, 2020) (Judge Virginia A. Phillips). Stemmelin has already offered materially similar evidence to support his allegation that Matterport competes with MSPs (*see* Dkt Nos. 115 at 15-20; 123-3 at 2). This "new" evidence (which does not substantively qualify as "new" at all) does not present any changed circumstances.

Finally, the present motion appears to constitute a test motion for *Lynch v. Matterport Inc.*, No. C 22-03704 WHA (N.D. Cal. filed June 23, 2022), a related lawsuit originally filed in the Superior Court of California and later removed. The original *Lynch* complaint was filed in state court two weeks after the March order herein denying class certification. The now-operative *Lynch* complaint has an identical class definition as that stated in the present motion, largely echoes the pleadings herein, and has the same plaintiff's counsel. *See Lynch*, No. C 22-03704 WHA, Dkt. Nos. 1-1 at 14, 1-3 at 20 (N.D. Cal. June 23, 2022). This duplication also counsels against hearing another class-certification motion here.

CONCLUSION

For the foregoing reasons, the motion to strike is **GRANTED**, and the second class-certification motion is **STRICKEN**. **IT IS SO ORDERED.**

Dated: October 3, 2022.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE